

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
LARRY R. COOPER,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 82-7

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal from the issuance of a \$250 civil penalty for the alleged violation of Sections 8.02(2) and 8.02(5) of respondent's Regulation I, came on for hearing before the Pollution Control Hearings Board, Nat W. Washington (presiding), at a formal hearing at the Seattle-Tacoma International Airport on March 8, 1982.

Appellant represented himself; respondent was represented by its attorney Keith D. McGoffin.

Having heard or read the testimony, having examined the exhibits, having considered the contentions of the parties; and the Board having

1 served its proposed decision upon the parties herein, and having
2 received exceptions thereto; and the Board having considered the
3 exceptions, and having granted the exceptions in part and denied said
4 exceptions in part, the Board now makes these

5 FINDINGS OF FACT

6 I

7 Respondent, pursuant to RCW 43.21B.260, has filed with this Board
8 a certified copy of its Regulation I containing respondent's
9 regulations and amendments thereto of which notice is taken.

10 II

11 On November 9, 1981, at about 4:45 p.m., appellant caused or
12 allowed an outdoor fire on his property near 32125-176th Avenue SE,
13 Auburn, Washington, during the forecast stage of an air pollution
14 episode as defined in RCW 70.94.710 through 70.94.730.

15 III

16 Appellant caused or allowed the outdoor fire without having first
17 obtained a permit from the King County Fire Protection District No. 44.

18 IV

19 The Department of Ecology declared a forecast stage air pollution
20 episode to be in effect for the entire state of Washington beginning
21 at 10:00 a.m., November 9, 1981. The episode declaration was allowed
22 by the Department of Ecology to expire at 1:00 p.m. on November 10,
23 1981, for all counties in Western Washington.

24 V

25 The forecast stage episode began at 10:00 a.m. on November 9,

1 1981, and ended at 1:00 p.m. on November 10, 1981. The subject fire
2 was not started by appellant and his son until after 10:00 a.m. on
3 November 9. Thus, this was a new fire which was ignited after the
4 episode began.

5 VI

6 The appellant was not aware of the air pollution episode when he
7 started the fire.

8 VII

9 Appellant asserted the defense that the fire was for the purpose
10 of cooking as provided under Section 8.03(1). Although there were no
11 discernable circumstances and no visible physical evidence of the sort
12 usually associated with outdoor cooking, appellant testified that he
13 intended to use the fire to cook a salmon.

14 VIII

15 Any Conclusion of Law which should be deemed a Finding of Fact is
16 hereby adopted as such.

17 From these Findings the Board enters these

18 CONCLUSIONS OF LAW

19 I

20 The laws of the State of Washington, RCW 70.94.740 provide:

21 It is the policy of the state to achieve and maintain
22 high levels of air quality and to this end to
23 minimize to the greatest extent reasonably possible
24 the burning of outdoor fires. Consistent with this
25 policy, the legislature declares that such fires
26 should be allowed only on a limited basis under
27 strict regulation and close control. (Underscoring
provided.)

1 II

2 The forecast stage air pollution episode declared by the
3 Department of Ecology to begin at 10:00 a.m., November 9, 1981,
4 provided in part as follows:

5 Under a Forecast Stage, open fires shall be
6 curtailed. No fuel shall be added to any existing
7 open fires and no new fires may be ignited. These
8 actions are necessary to prevent a buildup of air
9 contaminants during this period of poor ventilation.
10 This requirement applies to all open burning,
11 including householders burning trash, field burning,
12 slash burning, land clearing, metal salvage
13 operations, and any other open fires. (Underscoring
14 provided.)

15 III

16 Section 8.02 of Regulation I provides:

17 It shall be unlawful for any person to cause or
18 allow any outdoor fire:

19 (1) in any area where the Board has prohibited
20 outdoor burning under Section 11.01; or

21 (2) during any stage of an air pollution episode
22 as defined in RCW 70.94.710 through 90.94.730; or

23 (3) containing garbage, dead animals, asphalt,
24 petroleum products, paints, rubber products, plastics
25 or any substance other than natural vegetation which
26 normally emits dense smoke or obnoxious odors; or

27 (4) for the purpose of demolition, salvage or
28 reclamation of materials; or

29 (5) in violation of any applicable law, rule or
30 regulation of any governmental agency having
31 jurisdiction over such fire.

32 (Underscoring provided.)

33 The uncontroverted evidence clearly shows that appellant, by
34 igniting the subject fire after 10:00 a.m. on November 9, 1981,
35 violated Section 8.02(2) as alleged by respondent.

36 Section 8.03 provides exemptions under certain circumstances, but

1 | there are no exemptions provided for a violation of Section 8.02(2),
2 | which is the section violated by appellant.

3 | IV

4 | Appellant raised the defense that the fire was to be used for
5 | cooking purposes and therefore his fire was not illegal. By raising
6 | this defense, appellant relied on the provisions of Section 8.03,
7 | which provides:

8 | The following outdoor fires are exempt from
9 | Sections 8.02(1) and 8.05:

10 | (1) Small outdoor fires for pleasure, religious,
11 | ceremonial, cooking, or like social purposes;

12 | (2) Fires from torches, incense burners, insect
13 | pots, flares and smokeless waste gas burners;

14 | (3) Fires for abating a forest fire hazard, to
15 | prevent a hazard, for instruction of public officials
16 | in methods of forest fire fighting, and any
17 | silvicultural operation to improve forest lands.

18 | As pointed out in Conclusion of Law III, Section 8.03 does not,
19 | under any circumstance, exempt a fire ignited during an air pollution
20 | alert episode. This section exempts only those fires covered by
21 | Section 8.02(1) and 8.05, while fires during an air pollution episode
22 | are covered by Section 8.02(2). Appellant's defense is, therefore,
23 | not well taken.

24 | V

25 | Even if a fire for cooking purposes could be asserted as a defense
26 | to a fire started during an air pollution alert episode, appellant's
27 | fire was not proven to have been a cooking fire. Even when a cooking
28 | fire can be raised as a valid defense to a charge of unlawful outdoor
29 | burning, the burden of proving that the fire was really for cooking

1 purposes is on the person asserting the defense. Mere statements that
2 such was the purpose do not meet the burden of proof. There must be a
3 showing that there was readily visible physical evidence of the sort
4 usually associated with outdoor cooking and which reasonably point to
5 cooking as being the purpose for the fire. In this case there was no
6 testimony that a disinterested observer would have seen any physical
7 evidence or any circumstances which would reasonably have led to a
8 conclusion that the fire was being maintained for the purpose of
9 cooking. A sincere intent to later use a fire for cooking purposes,
10 unaccompanied by readily visible physical evidence or other
11 circumstances, pointing to the fact that the fire was to be so used,
12 is not sufficient to bring a fire within the exemption of Section 8.03.

13 VI

14 The fact that appellant was not aware of the forecast stage air
15 pollution episode is no defense.

16 VII

17 We do not address the allegation that appellant violated Section
18 8.02(5) for the reason that respondent did not establish the content
19 of the rules or regulations of King County Fire Protection District
20 No. 44 alleged to have been violated.

21 VIII

22 Any Finding of Fact which should be deemed a Conclusion of Law is
23 hereby adopted as such.

24 From these Conclusions the Board enters this

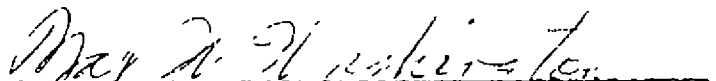
25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 82-7

ORDER

The \$250 civil penalty is affirmed, provided however, that \$150 of the civil penalty is suspended on condition that appellant not violate respondent's regulations for a period of two years from the date of appellant's receipt of this Order

DONE this 17th day of June, 1982.

POLLUTION CONTROL HEARINGS BOARD


NAT W. WASHINGTON, Chairman


GAYLE ROTHROCK, Vice Chairman